IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

JOHN LOBBAN MAYNARD,

Respondent.
_____/

Case No. 83,918
[TFB Case Nos. 93-30,761 (09C)
and 93-31,279 (09C)]

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Complainant is THE FLORIDA BAR hereinafter referred to as "The Bar". The Respondent is JOHN LOBBAN MAYNARD hereinafter referred to as "Respondent". References to the Report of the Referee, The Honorable Robert E. Pyle, shall be referred to as "ROR". Reference to the Transcript of the final hearing held on March 10, 1995 and March 24, 1995, shall be referred to as "T", followed by the appropriate page number.

STATEMENT OF THE CASE

The Respondent accepts The Bar's Statement of the Case modified and supplemented as follows:

The "two continuances" to which The Bar refers at page 1 of its brief were occasioned by Respondent's need for a total hip replacement carried out November 2, 1994. Despite the compelling medical evidence (Appendix 1) which showed a deteriorating condition, The Bar objected to any postponement to allow the procedure to be carried out. The Referee nevertheless granted a continuance. Without contacting Respondent's counsel or making any attempt to assess the necessary period of convalescence from this operation, The Bar immediately set a new hearing within the Respondent's recovery period. Again, over the objections of The Bar, a further continuance was sought and granted. Accordingly, what appears to be "two continuance (both at the Respondent's request)" is in fact the product of The Bar's harsh and intransigent attempt to force the Respondent to hearing in the face of serious medical necessity.

Prior to the hearing the Respondent filed a Motion in Limine asserting that he had been compelled on two occasions over the previous year to produce his entire trust account records for examination by The Bar. It was not until February 28, 1995, that these records were purportedly returned. The Motion in Limine (Appendix 2) relates the problem:

> 6. These records have been examined and substantial portions are found to be missing, including those which are most relevant to the issues raised by the Amended Complaint.
> 7. This fact was reported to the Referee at the telephone conference held March 6, 1995.

> 8. The Respondent is unable to prepare adequately to defend certain of the charges in the Amended Complaint.

Accordingly, the Respondent sought an Order excluding all evidence relating to alleged trust account violations. The Motion was heard at the beginning of the hearing and two Bar employees testified. It was clear that there was no clear chain of custody as to these records once they were in the possession of The Bar. They had been sent to the Ft. Lauderdale branch office for review and audit (T21) and had been returned to the Orlando office "sometime ago" (T21). No inventory of the records at the time that possession was taken by The Bar could be confirmed, (T22) and the records were apparently returned from the audit in June of 1994 (T22). At one point in the hearing the Referee admitted the potential for "horrible due process problems" (T25). He went on to state

> However, it is something that concerns me that nobody knows how the Bar ever came into possession of these records, or when, and they came here from an auditor in Ft. Myers (sic)...(T27, 28).

It was clear as the testimony continued that the Referee became "very concerned" (T28) admitting..."I'm fearful that somewhere along the line, someone laid some (of the records) aside or something",...(T29). After the Respondent and counsel were permitted an opportunity to review the records as presented by The Bar, they found that there was one trust card missing regarding Matthew Seibel and all of the ledger cards regarding Strausberg were missing (T13). The Referee eventually denied the Motion on a

qualified basis (T31).

On December 20, 1994, (Appendix 3) The Bar moved to consolidate Case No. 84,648 [TFB Case No. 94-31,320 (09C)] with the instant case for the ostensible purpose of having a consolidated disciplinary phase. At least one of the reasons for this procedure was identified by Bar counsel when she noted that it would keep the Respondent's character witnesses from having to appear twice if sanctions were recommended in both cases (T468).

At the conclusion of the hearing in the instant case the Referee made reference to this purpose, stating that he would be willing to conduct these cases in this manner subject, of course, to this Court's approval (T468 - 470). The Referee concluded by stating that he would consult with the Clerk of this Court or simply state in his report that he was deferring recommendation as to sanctions, if any, until the second case could be heard.

Notwithstanding, when the Report and Recommendation was issued by the Referee it contained a recommendation for a ninety one day suspension with reinstatement subject to proof of rehabilitation. No indication was made as to whether leave was sought of this Court for the consolidated procedure.

STATEMENT OF THE FACTS

The Respondent accepts The Bar's Statement of the Facts modified and supplemented as follows:

At the time that Randy Strausberg met the Respondent, Mr. Strausberg was a "reasonably active real estate investor" (T67). Additionally, he was licensed as an investment advisor and registered with the SEC (T167) having spent a substantial portion of his earning life serving as a broker and advisor.

> Mr. Strausberg was one of the most sophisticated men I've ever met, including in his income level, and moving assets around and hiding assets and such was something he had done many times before he ever met me (T399).

The Respondent and Mr. Strausberg had even travelled to the British Channel Islands looking for tax havens (T459). Mr. Strausberg had had extensive problems with the IRS including decade long litigation that had been conducted in New York (T67). It was this problem that prompted him to consider an irrevocable trust for his children (T69). While he could not recall whether he or the Respondent had first thought of the trust, it was clear that Mr. Strausberg was anxious to have some vehicle that would remove surplus assets from his estate (T69). Among the intended purposes of the trust was to have money available for the education and religious celebration of the Strausberg children (ROR1,2). It was the Respondent's express recollection that Mr. Strausberg conceived the idea of the trust and requested that the Respondent serve as Trustee (T398). Mr. Strausberg admitted that he was looking for an arrangement in which he would be in a position to influence the

investments made by the trustee (T86). The Respondent stated that he was reluctant to serve as trustee, never received any remuneration from the trust for doing so, and explored a number of other options including expanding an existing trust (T398), all of which were rejected by Mr. Strausberg.

With regards to the matter of Gary Monieson, Mr. Strausberg stated that the Respondent had told him that he had furnished the necessary correspondence to Mr. Strausberg's accountant, Joel Ashe, a New York CPA, prior to October of 1991 as he had been directed to do (T141). Over the objections of the Respondent, Mr. Strausberg related that Mr. Ashe had told him that he had not received copies of the subject correspondence until April of 1992, too late to be used to Mr. Strausberg's advantage for his 1991 tax return (T141, 142, 145). Notwithstanding, Mr. Strausberg admitted that he had copies of the same correspondence provided to him at the time that the correspondence was sent to Mr. Monieson (T138). The only other evidence on this point was the Respondent's direct sworn testimony that he had in fact complied in a timely manner with everything that he had been directed to do by Mr. Strausberg regarding this matter (T428).

SUMMARY OF THE ARGUMENT

The appropriateness of discipline depends, in large measure, upon the Respondent's capacity for rehabilitation. The supreme sanction of disbarment is reserved for those lawyers who hold little or no promise of rehabilitation. In the instant case there has been no finding of bad motive on the part of the Respondent and the most serious charge against him relating to the Strausberg children's trust is mitigated by the fact that he was serving as trustee at Randy Strausberg's behest and not expressly as an attorney.

While the Respondent does not contest the recommended discipline, he was not afforded an opportunity to present matters in mitigation. Due to an initiative taken by The Bar, the penalty phases of this case was consolidated with that of another held before the same referee. If this Court feels that the record in the instant case does not support the recommended discipline, the Respondent should have an opportunity to present matters in mitigation. This is particularly important since the Respondent, during virtually all relevant periods, was suffering from alcoholism from which he is now recovering.

The only evidence to support The Bar's case respecting the matter of Gary Monieson is the hearsay testimony of Randy Strausberg relating a conversation he had with his New York CPA, Joel Ashe. This testimony does not rise to the level of clear and convincing evidence, particularly in face of this one contradiction by the Respondent.

The Motion in Limine should have been granted since the Referee recommended conviction regarding various trust account discrepancies pertaining to Randy Strausberg. These accusations could have been defended against had the Respondent had returned to him all of the records he had been required to furnish to The Bar.

ARGUMENT

BAR'S POINT ON REVIEW:

WHETHER THE RECOMMENDED DISCIPLINE IS APPROPRIATE WITH THE REFEREE'S FINDINGS AND THE RESPONDENT'S PAST RECORD.

CROSS POINT ONE

WHETHER THE FAILURE OF THE REFEREE TO DEFER RECOMMENDING DISCIPLINE UNTIL THE CONCLUSION OF CASE NO. 84,648 [TFB CASE NO. 94-31,320 (09C)] HAS PREJUDICED THE RESPONDENT BY DENYING HIM AN OPPORTUNITY TO PRESENT MATTERS IN MITIGATION.

If the array of authorities cited by The Bar shows nothing else, they demonstrate that this Court determines discipline on a case by case basis. Considered are the totality of the circumstances of the offense, the Respondent's past record and any collateral matters, including the influence of substance abuse, which may have contributed to the respondent's derelictions. The facts in no two cases are identical and this Court has cited generously to matters which have both mitigated and militated in its determination of appropriate discipline. On one point, however, this Court has been particularly consistent and that is that the ultimate sanction of disbarment is reserved for those lawyers who hold no promise of rehabilitation.

> the extreme sanction of disbarment is to be imposed only "in those rare case where rehabilitation is highly improbably" (citation omitted) The Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986) at p. 181, 182.

The Respondent in the instant case does not claim to be blameless. Except for Count Three, he does not dispute the factual findings of the Referee. Thus, the issue before this Court is to

determine how the conduct of the Respondent, as well as his present attitude, demonstrate his potential for reform.

To begin with, the depiction of the Respondent by The Bar is wholly distorted. The Bar has sought to characterize the Respondent as a guileful predator who ingratiated himself with Mr. Strausberg and Dr. Seibel as a ruse to secure their trust and ultimately their funds. The record simply does not support such a depiction. Neither Mr. Strausberg or Dr. Seibel questions the genuineness of the friendship, indeed affection, existing between themselves and the Respondent during most of their acquaintenanceship. If anything, it was Mr. Strausberg who imposed upon this relationship to draw the Respondent into his world of investment by requesting that he serve as trustee of the children's trust. Obviously, this afforded Mr. Strausberg all of the advantages of an inter vivos trust, while, due to his close relationship to the trustee, affording him influence that was tantamount to control. The record is clear that Mr. Strausberg intended to "recommend" investments and did so. He also expected to have the corpus dispersed from time to time for the educational and religious needs of his children. Unfortunately, Mr. Strausberg for, whatever reason, did not exercise the close control that he originally contemplated and, accordingly, the Respondent, no expert on investments, was left to do the best he could. For the most part he made loans to people whom he knew and trusted. In hindsight his judgment was misplaced, a fact that was aggravated (at least as far as the transaction with James Hart was concerned)

with an unforeseen economic down turn in the local real estate market. Nevertheless, he did make most investments in mortgages as Mr. Strausberg requested (T401). He did lend funds to Bernard Weinstein, but the evidence shows that those funds were repaid in full before Mr. Weinstein became a trustee. He loaned money to himself and is adamant that this loan was repaid with interest. In fact he lost thousands of his own funds trying to save the trust (T413).

Regarding the transactions with Dr. Seibel, the Respondent concedes that he did not comply with all of the express requirements of the rules governing dealings with clients. Of the three transactions involved, the first, the $35,000.00 loan, was concluded to Dr. Seibel's satisfaction. The subsequent $33,000.00 loan obviously was not. Nevertheless, Dr. Seibel, a physician who certainly understood the basic mechanics of loans, was fully aware that he was lending unsecured money to a friend in need.

If the letter of the rules was violated, the spirit was not. Clearly it is the intention of the strict standards to which lawyers are held to protect the trusting public which relies upon attorneys to negotiate the rocks and shoals of unfamiliar waters. In the instant case both Mr. Strausberg and Dr. Seibel were eminently familiar with the waters in which they were traveling with the Respondent. Mr. Strausberg was unquestionably a highly sophisticated investor, much more conversant that the Respondent regarding the real estate, securities and futures markets and related finance. He devised a scheme relying heavily upon his

relationship with the Respondent. Similarly, Dr. Seibel understood the nature of loans, understood the nature of security and knew that he was making an unsecured loan to a friend. No doubt the Respondent assured him that his impending fortunes would permit him to repay the loan. However, there is nothing to indicate that these assurances were not made in good faith.

The Bar has correctly pointed out in its brief regardless of his other findings, the Referee did not find that the Respondent was guilty of bad motive, a highly mitigating factor The Florida Bar v. Davis, 361 So.2d 159 (Fla. 1978). The absence of bad motive is clearly reflected in the discipline recommended by the Referee. As has been pointed out earlier, this discipline is entirely appropriate unless it can be shown that the Respondent is beyond rehabilitation. Since the recommended sanctions are a reflection of the absence of bad motive they are inextricably linked to the evidence, more specifically to the candor and demeanor of the Respondent whose testimony consumed the greatest part of the proceedings.

> The rulings of a trial court arrive in appellate courts for the presumption of correctness and appellate courts must interpret the evidence in a manner most favorable to sustain the trial court's rulings (citations omitted). The appellate court may not substitute its judgment for that of the trier effect Horatio Enterprises, Inc. v. Rabin, 619 So.2d 555 (3rd DCA 1993).

Moreover, the fact that the Respondent was serving as trustee of an irrevocable inter vivos trust clearly distinguishes him and his obligations from trust funds he maintains in his capacity as an

attorney. He has been cited for his failure to report to Mr. Strausberg, yet Mr. Strausberg, the settlor of the trust, had of necessity relinquished control over his funds and could serve only in an advisory capacity. Even that might have been deemed questionable by the IRS had the matter been investigated. In any event, the Respondent clearly owed a lesser duty to Mr. Strausberg. Certainly this issue raised doubts in the mind of the Referee who sought, but never received an advisory opinion from The Bar on this point (T467).

As noted in the Statement of the Case, The Bar had moved to transfer Case No. 84,648 to the Referee in the instant case so as to consolidate the penalty phases. At the close of the hearing the Referee told the parties that he would endeavor to submit his report without recommending discipline. Without any explanation, the report in fact contains recommended discipline. Notwithstanding the lack of opportunity to present matters in mitigation, the Respondent is willing to accept this recommendation. The Bar, however, is contesting this recommendation, a fact which makes the Respondent vulnerable since he is now obliged to defend the recommendations based upon a record devoid of expressly mitigating evidence. Accordingly, if this Court feels that the record is insufficient to sustain the Referee's recommendation, the Respondent prays that the case be remanded for further proceedings as originally contemplated. Case

No. 84,648 was heard on July 7, 1995, and the report is expected shortly. In support of this request, the Respondent proffers that he was seriously impaired for much of the relevant time by alcoholism.

> This Court has in the past held that a loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed...The Florida Bar v. Rosen, supra at p. 181, 182.

This defense is anticipated by The Bar in its brief at page 29. The Respondent will be able to demonstrate that due to courageous and aggressive treatment that he has been alcohol-free for the last year and a half and requests the opportunity to make that case as well as to present any other matters in mitigation.

CROSS POINT TWO

THERE IS NO CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE REFEREE'S FINDING AS TO COUNT THREE.

In this Count the Respondent is accused of failing to send to Mr. Strausberg's accountant in New York, Mr. Joel Ashe, copies of the correspondence that the Respondent had sent to Gary Monieson in an attempt to collect approximately $50,000.00 due by Monieson to Mr. Strausberg. The correspondence was not sent in any serious anticipation that Monieson would be able to pay the debt, but rather to document the loan as uncollectible for Mr. Strausberg's tax purposes. There is no issue that the correspondence was sent by the Respondent to Monieson nor that copies of that correspondence were provided directly to Mr. Strausberg. The sole issue is whether the Respondent failed to provide Mr. Ashe with copies of this correspondence, an undertaking which Mr. Strausberg could just as easily have accomplished himself. The sole evidence to support The Bar's claim is the hearsay testimony (admitted over the objections of the Respondent) that Mr. Strausberg had spoken to Mr. Ashe and that Mr. Ashe claimed that he had not received copies of the Monieson correspondence on time. In allowing in this hearsay, the Referee apparently relied upon The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986) which Bar counsel kept urging as a carte blanche for hearsay evidence at Bar proceedings. What is clear from the Vannier case is that in permitting certain hearsay records, the Court was satisfied as to its authenticity and, therefore, concluded that the records were competent. By contrast

in the instant case, Mr. Strausberg has substituted his testimony for that of Mr. Ashe. It is not subject to cross-examination and, even if true, does not prove by clear and convincing evidence that the Respondent was derelict. Clearly other reasons besides the failure of the Respondent, such as miscommunication or incorrect address, would explain Mr. Ashe's failure to receive this documentation. Moreover, since Mr. Ashe had a clear interest in the fact that the income tax return in question did not reflect the $50,000.00 deduction, he may very well have been looking for someone else to blame for this failure. In any event, many of these matters could have been developed on cross-examination had Mr. Ashe been called to testify. In the face of this was the Respondent's sworn testimony that he had in fact done exactly as he had been directed in all respects concerning the Monieson matter. The Bar has simply not proven its case by clear and convincing evidence on this Count.

CROSS POINT THREE

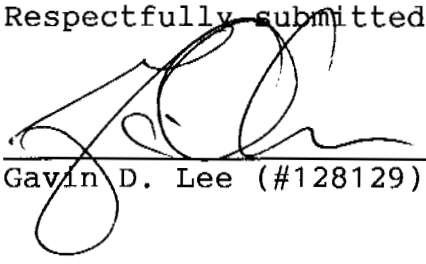
WHETHER THE REFEREE ERRED IN FAILING TO GRANT THE RESPONDENT'S MOTION IN LIMINE.

In the instant case, serious implications have been made that the Respondent's trust records cannot be reconciled or the certain reimbursements, particularly to the Strausberg children's trust cannot be verified. It has remained the Respondent's consistent contention that trust records, most of which languished for a year in the custody of The Bar, were returned incomplete. Conspicuously absent were certain records pertaining to Mr. Strausberg (T13). The absence of such records rendered incompetent those records that were introduced by The Bar. Accordingly, the Motion in Limine should have been granted to provide a level playing field on the issue of the Bar's records.

CONCLUSION

For the reasons noted above, the findings of the Referee should be confirmed subject to the Respondent's objections to Count Three. If the Court does not feel that the record supports the recommended discipline, the case should be remanded for further proceedings to allow the introduction of mitigating evidence on behalf of the Respondent.

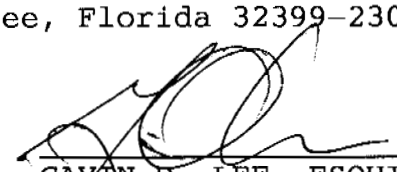
Respectfully submitted,



Gavin D. Lee (#128129)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail this 22nd day of July, 1995, to FRANCES C. BROWN, ESQUIRE, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.



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APPENDIX